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7 CONTEST PROMOTIONS, LLC,
8 Plaintiff,
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10 v.
11 CITY AND COUNTY OF SAN
12 FRANCISCO,
13 Defendant.

Case No. [15-cv-00093-SI](#)

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15 **ORDER GRANTING IN PART**
16 **DEFENDANT'S MOTION TO DISMISS**

17 Re: Dkt. No. 15

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19 Before the Court is a motion to dismiss filed by the defendant City and County of San
20 Francisco (“the City”), seeking dismissal of Contest Promotions, LLC’s complaint for failure to
21 state a claim, currently set for argument on April 24, 2015. Pursuant to Civil Local Rule 7-1(b),
22 the Court finds this matter appropriate for resolution without oral argument and hereby
23 VACATES the hearing. For the reasons stated below, the Court GRANTS the City’s motion as to
24 Contest Promotions’ federal law claims, and DEFERS ruling on its state law claims.

25
26 **BACKGROUND**

27 This is the second lawsuit plaintiff has brought against the City to challenge the legality of
28 its signage ordinances. Plaintiff is a corporation that organizes and operates contests and raffles
whereby individuals are invited to enter stores for the purpose of filling out an application to enter
a contest. Complaint ¶ 6. Plaintiff leases signage space from the store in order to promote its
contests to passersby. *Id.* ¶ 7. The business model drives increased foot traffic to the stores, while
also promoting the product or event which is the subject of the raffle or contest. *Id.* Plaintiff
operates in many cities across the United States including San Francisco, Los Angeles, New York,
Seattle, and Houston. *Id.* ¶ 8.

1 **I. First Law Suit**

2 In early 2007, Contest Promotions approached the City to discuss its business model in
3 light of the City's restriction on certain types of signage. At the time, as is still the case today, the
4 City banned the use of "off-site" signage, known as General Advertising Signs, but permitted "on-
5 site" signage, known as Business Signs. The primary distinction between the two types of signage
6 pertains to where they are located. Broadly speaking, a Business Sign advertises for the business
7 to which it is affixed, while a General Advertising Sign advertises for a third-party product or
8 service which is not sold on the premises to which the sign is affixed.¹ The quintessential example
9 of an off-site (or General Advertising) sign would be a billboard.

10 Beginning in late 2007, the City began citing all of Contest Promotions' signs with Notices
11 of Violation ("NOVs"), contending that they were General Advertising Signs in violation of the
12 Planning Code. In all, over 50 NOVs were issued, each ordering that the signage be removed
13 under penalty of potentially thousands of dollars in fines per sign. Complaint ¶¶ 14-15.

14 In response, on September 22, 2009, Contest Promotions filed its first lawsuit in this Court,
15 challenging -- both facially and as applied -- the constitutionality of the City's ordinance
16 prohibiting its signage. Case No. 09-cv-4434, Docket No. 1. On May 18, 2010, the Court granted
17 in part and denied in part the City's motion to dismiss. Case No. 09-04434, Docket No. 32. In its
18 order, the Court reasoned that Contest Promotions had adequately alleged that the "incidentally"
19 language employed in the ordinance was unduly broad, vague, and could potentially invite
20 unbridled discretion on the part of City officials. *Contest Promotions, LLC v. City & Cnty. of San*
21 *Francisco*, No. C 09-04434 SI, 2010 WL 1998780 (N.D. Cal. May 18, 2010). The Court denied
22 defendant's motion as to all of Contest Promotions' First Amendment Claims, but granted with
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25 ¹ In 2007, a General Advertising Sign was defined under Planning Code § 602.7 as a sign
26 "which directs attention to a business, commodity, industry or other activity which is sold, offered
27 or conducted elsewhere than on the premises upon which the sign is located, or to which it is
28 affixed, and which is sold offered or conducted on such premises *only incidentally if at all.*" (emphasis
added). A Business Sign was defined under Planning Code § 602.3 as "[a] sign which
directs attention to a business, commodity, service, industry, or other activity which is sold,
offered, or conducted, *other than incidentally*, on the premises upon which such sign is located, or
to which it is affixed." (emphasis added).

1 leave to amend as to its Equal Protection claim. *Id.* On February 1, 2013, the parties reached a
2 settlement. The terms of the settlement required the following actions: (1) the City would construe
3 plaintiff's signs as Business Signs, as the Planning Code defined them at the time; (2) Contest
4 Promotions would re-permit its entire inventory of signs to ensure compliance with the Planning
5 Code and the settlement agreement, despite the fact that plaintiff already had previously received
6 permits for these signs; (3) Contest Promotions would dismiss its lawsuit against the City; and (4)
7 Contest Promotions would pay the City \$375,000. Complaint ¶¶ 20-23. On July 8, 2014, the City's
8 Board of Supervisors approved the settlement and Contest Promotions made an initial payment of
9 \$150,000. *Id.* ¶ 24.

11 **II. The Present Lawsuit**

12 Soon after approving the settlement, on July 19, 2014, the Board of Supervisors passed
13 legislation to amend the definition of Business Sign under Planning Code § 602.3. *Id.* ¶¶ 26-28.
14 Section 602.3 now defines a Business Sign as “[a] sign which directs attention to a the primary
15 business², commodity, service, industry or other activity which is sold, offered, or conducted,
16 ~~other than incidentally~~, on the premises upon which such sign is located, or to which it is affixed.”
17 (amendments emphasized). When Contest Promotions submitted its signs for re-permitting
18 pursuant to the Settlement Agreement, the City denied its applications for failure to comply with
19 the Planning Code as amended. Complaint ¶ 32. Plaintiff alleges that the Planning Code was
20 amended “for the specific purpose of targeting Contest Promotions and denying Contest
21 Promotions the benefit of its bargain under the Settlement Agreement and to prevent Contest
22 Promotions from both permitting new signs and obtaining permits for its existing inventory as it is
23 required to do under the Settlement Agreement.” *Id.* ¶ 29. The City contends that the ordinance
24 was amended to address the concerns the Court expressed in its 2010 order. Docket No. 15, Def.
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28 ² The section was also amended to clarify that “[t]he primary business, commodity,
service, industry, or other activity on the premises shall mean the use which occupies the greatest
area on the premises upon which the business sign is located, or to which it is affixed.” S.F.
Planning Code § 602.3.

1 Mot. at 14.

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3 On January 8, 2015, Contest Promotions filed the present action alleging a number of
4 constitutional³ and state law claims. Docket No. 1. The Complaint alleges causes of action for (1)
5 violation of the First Amendment, (2) denial of Due Process, (3) inverse condemnation, (4) denial
6 of Equal Protection, (5) breach of contract, (6) breach of implied covenant of good faith and fair
7 dealing, (7) fraud in the inducement, (8) promissory estoppel, and (9) declaratory relief. *Id.* ¶¶ 36-
8 116. On March 13, 2015, the City filed a motion to dismiss the complaint for failure to state a
9 claim. Docket No. 15.

10 **LEGAL STANDARD**

11 To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must allege “enough facts to
12 state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570
13 (2007). This “facial plausibility” standard requires the plaintiff to allege facts that add up to
14 “more than a sheer possibility that a Defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S.
15 662, 678 (2009). While courts do not require “heightened fact pleading of specifics,” a plaintiff
16 must allege facts sufficient to “raise a right to relief above the speculative level.” *Twombly*, 550
17 U.S. at 544, 555. “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the
18 elements of a cause of action will not do.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at
19 555). “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual
20 enhancement.’” *Id.* (quoting *Twombly*, 550 U.S. at 557). “While legal conclusions can provide
21 the framework of a complaint, they must be supported by factual allegations.” *Id.*

22 In reviewing a Rule 12(b)(6) motion, a district court must accept as true all facts alleged in
23 the complaint, and draw all reasonable inferences in favor of the plaintiff. *See al-Kidd v. Ashcroft*,
24 580 F.3d 949, 956 (9th Cir. 2009). However, a district court is not required to accept as true
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27 ³ While not pled as independent causes of action, for every federal constitutional claim,
28 Contest Promotions alleges a violation of the analogous provision of the California Constitution.
In its motion, the City does not discuss the viability of these state constitutional claims; therefore,
the Court does not consider them for purposes of this motion.

“allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). As a general rule, the Court may not consider any materials beyond the pleadings when ruling on a Rule 12(b)(6) motion. *Lee v. City of L.A.*, 250 F.3d 668, 689 (9th Cir. 2001). However, pursuant to Federal Rule of Evidence 201, the Court may take judicial notice of “matters of public record,” such as prior court proceedings, without thereby transforming the motion into a motion for summary judgment. *Id.* at 688-89. If the Court dismisses a complaint, it must decide whether to grant leave to amend. The Ninth Circuit has “repeatedly held that a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (citations and internal quotation marks omitted).

DISCUSSION

I. First Amendment

Plaintiff posits two theories for why Section 602.3 violates the First Amendment. First, plaintiff contends that it unconstitutionally abridges plaintiff's right to commercial speech. Complaint ¶¶ 36-47. Second, plaintiff contends that the ordinance invites unbridled discretion by City officials and thus constitutes an unconstitutional prior restraint on speech. Complaint ¶¶ 48-57.

A. Commercial Speech

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.” U.S. Const. amend. I. States and local governments are bound by this prohibition through the Fourteenth Amendment to the Constitution. *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 707 (1931) (“It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action.”). Although commercial speech is afforded First

1 Amendment protections, it has a subordinate position to noncommercial forms of expression.
2 *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 430 (1993). Accordingly, it is afforded
3 “somewhat less extensive” protection than is afforded noncommercial speech. *Zauderer v. Office*
4 *of Disciplinary Counsel*, 471 U.S. 626, 637 (1985); *see also In re Doser*, 412 F.3d 1056, 1063 (9th
5 Cir. 2005).

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7 First Amendment protections apply to commercial speech only if the speech concerns a
8 lawful activity and is not misleading. Once it has been established that the speech is entitled to
9 protection, any government restriction on that speech must satisfy a three-part test: (1) the
10 restriction must seek to further a substantial government interest, (2) the restriction must directly
11 advance the government’s interest, and (3) the restriction must reach no further than necessary to
12 accomplish the given objective. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447
13 U.S. 557, 563-66 (1980).

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15 The City does not contend that plaintiff’s signs contain either unlawful or misleading
16 speech. Def. Mot. at 8. Accordingly, the Court presumes that First Amendment protections apply
17 to the commercial speech at issue. With respect to the first element of the *Central Hudson* test,
18 the Supreme Court has specifically held that the City’s interest in enacting the ordinance – to
19 promote traffic safety and aesthetics – is a substantial governmental interest.⁴ *See Metromedia,*
20 *Inc. v. City of San Diego*, 453 U.S. 490, 507-09 (1981); *see also* S.F. Planning Code § 101. The
21 Supreme Court has also held that ordinances differentiating between on-site and off-site
22 advertisements are directly related to the substantial governmental interests of safety and
23 aesthetics. *Id.* Accordingly, the first and second elements of the *Central Hudson* analysis are
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⁴ Plaintiff concedes in its complaint that the City has “a substantial government interest in regulating signage, for the purpose of promoting traffic safety and aesthetics.” Complaint ¶ 40.

1 satisfied.⁵

2 The third element of the *Central Hudson* analysis – whether the ordinance reaches no
3 further than necessary to achieve its objective – bears the most scrutiny. The Supreme Court has
4 explained that in order to satisfy this element,

5 The Government is not required to employ the least restrictive
6 means conceivable, but it must demonstrate narrow tailoring of the
7 challenged regulation to the asserted interest – a fit that is not
8 necessarily perfect, but reasonable; that represents not necessarily
9 the single best disposition but one whose scope is in proportion to
10 the interest served.

11 *Greater New Orleans Broadcasting Ass'n, Inc. v. U.S.*, 527 U.S. 173, 188 (1999) (internal
12 quotation marks and citation omitted). In the *Metromedia* case, the Supreme Court suggested that
13 an outright ban on off-site commercial speech is not unduly broad. *Metromedia*, 453 U.S. at 508
14 (“The city has gone no further than necessary in seeking to meet its ends. Indeed, it has stopped
15 short of fully accomplishing its ends: It has not prohibited all billboards, but allows onsite
16 advertising and some other specifically exempted signs.”).

17 Nonetheless, citing *Ballen v. City of Redmond*, 466 F.3d 736 (9th Cir. 2006) and *Lorillard*
18 *Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), plaintiff argues that Section 602.3 violates the final
19 prong of *Central Hudson*. However, as the City correctly points out, these cases are
20 distinguishable because they addressed content-based bans on commercial speech – *Lorillard*
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23 ⁵ “[U]nder Supreme Court precedent, regulations are unconstitutionally underinclusive
24 when they contain exceptions that bar one source of a given harm while specifically exempting
25 another[.]” *Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 906 (9th Cir. 2009). Therefore “a regulation can be unconstitutional if it ‘in effect restricts too little speech because its
26 exemptions discriminate on the basis of the signs’ messages [or because] [t]hey may diminish the
27 credibility of the government’s rationale for restricting speech in the first place.’” *Id.* at 904-905
(quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 50–51 (1994)). Here, Contest does not argue that
Section 602.3 is underinclusive.

1 concerned restrictions on tobacco advertising, while *Ballen* addressed a ban on portable signs with
2 certain content-based exceptions. As the Court in *Ballen* made clear:

3 In *Metromedia* the distinction that was challenged and upheld was
4 between onsite and offsite billboards. It was a content-neutral
5 distinction. The categorical nature of the ordinance in *Metromedia*
6 precludes its application here. Instead, the inconsistent content-
7 based nature with which the Redmond Ordinance distinguishes its
8 interests and the availability of less restrictive alternatives to achieve
9 the City's goals are fatal under *Central Hudson*'s [final] prong.

10 *Ballen*, 466 F.3d at 744. Unlike the laws at issue in *Ballen* and *Lorillard*, Section 602.3 is content-
11 neutral,⁶ and its fate is therefore dictated by *Metromedia*, which upheld an outright ban on off-site
12 advertising.

13 In *Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 912 (9th Cir. 2009), the Ninth
14 Circuit considered the constitutionality of a law that is substantially similar to Section 602.3.⁷
15 Citing *Metromedia* fifty-six times, the court upheld the law's constitutionality under the *Central*
16 *Hudson* test. Section 602.3 is substantially similar to the law at issue in *Metro Lights*; the Court
17 therefore finds that the same result must follow. Accordingly, the Court GRANTS defendant's
18 motion to dismiss as to plaintiff's first cause of action for violation of its commercial speech
19 rights.

20 ⁶ "A regulation that serves purposes unrelated to the content of expression is deemed
21 neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v.*
22 *Rock Against Racism*, 491 U.S. 781, 791 (1989)

23 ⁷ "L.A.M.C. § 91.6205.11, provided that '[s]igns are prohibited if they . . . [a]re off-site
24 signs, except when off-site signs are specifically permitted pursuant to a variance, legally adopted
25 specific plan, supplemental use district or an approved development agreement. This shall also
26 apply to alterations or enlargements of legally existing off-site signs.' The L.A.M.C. defines 'Off-
27 Site Sign' as '[a] sign which displays any message directing attention to a business, product,
28 service, profession, commodity, activity, event, person, institution or any other commercial
message, which is generally conducted, sold, manufactured, produced, offered or occurs elsewhere
than on the premises where such sign is located.' L.A.M.C. § 91.6203." *Metro Lights* 551 F.3d at
901-02.

B. Prior Restraint

Section 602.3 defines a Business Sign as a “[a] sign which directs attention to the primary business, commodity, service, industry or other activity which is sold, offered, or conducted on the premises upon which such sign is located, or to which it is affixed.” Contest Promotions argues that “the City has not provided clear direction regarding the definition of ‘primary.’ In using vague standards, the City provided itself unfettered discretion to grant or deny applicants the right to engage in a popular form of free speech.” Complaint ¶ 51. Contest Promotions argues that the ordinance’s vague standards, coupled with the City’s permitting requirement, constitutes an unlawful prior restraint on speech.

To comply with constitutional free speech protections, ordinances governing advertising must contain “adequate standards to guide the official’s decision and render it subject to effective judicial review.” *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1082 (9th Cir. 2006). In addressing whether the ordinance at issue here contains sufficient standards to avoid granting City officials unbridled discretion in interpreting the term “primary,” each party relies on different Ninth Circuit case law addressing advertising-related ordinances.

Plaintiff cites *Desert Outdoor Advertising v. City of Moreno Valley*, 103 F.3d 814 (9th Cir. 1996) for the proposition that an ordinance permitting city officials to make subjective, unguided determinations is unconstitutional. In *Desert Outdoor Advertising*, the City of Moreno Valley adopted an ordinance restricting any sign deemed “detrimental to the aesthetic quality of the community or the surrounding land uses.” *Id.* at 818. The ordinance did not provide local officials with any standards or tools to assist in making this determination, and the Ninth Circuit ruled that the ordinance was unconstitutional because it permitted unbridled discretion.

In contrast, the City relies on *G.K. Ltd.* and on *Outdoor Media Group v. City of Beaumont*, 506 F.3d 895 (9th Cir. 2007). In *G.K. Ltd.*, the ordinance in question stated that signs must “be

1 compatible with other nearby signs, other elements of street and site furniture and with adjacent
2 structures.” 436 F.3d at 1082. Although the ordinance also directed officials to consider signs’
3 aesthetic properties, the Ninth Circuit distinguished *Desert Outdoor Advertising* because the
4 ordinance in *G.K. Ltd.* provided objective criteria for city officials to apply. In assessing a sign’s
5 “compatibility” with nearby signs, officials were specifically to examine “the relationships of the
6 elements of form, proportion, scale, color, materials, surface treatment, overall sign size and the
7 size and style of lettering.” *Id.* The Ninth Circuit determined that the ordinance was sufficiently
8 specific to permit effective review of City decisions, and therefore did not permit unbridled
9 discretion. *Id.* The court also found it important that the ordinance required the city to articulate
10 the reasons for its decision to grant or deny the permit. *Id.* at 1083 (citing *Thomas v. Chicago Park*
11 *Dist.*, 534 U.S. 316, 324 (2002)).

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13 In *Outdoor Media Group*, the Ninth Circuit upheld the constitutionality of an ordinance
14 which prohibited off-site signs, defined as “any sign which advertises or informs in any manner
15 businesses, services, goods, persons or events at some location other than that upon which the sign
16 is located,” and required all signs to be “compatible with the style or character of existing
17 improvements upon lots adjacent to the site, including incorporating specific visual elements such
18 as type of construction materials, color, or other design detail.” 506 F.3d at 904 (quotation marks
19 and alteration omitted). The Ninth Circuit held that city officials’ discretion with respect to the
20 off-site prohibition was sufficiently “cabined by specific findings regarding the relationship of the
21 sign to the site, the freeway, and other signs in the area,” and that the “compatibility requirement
22 delineate[d] fairly specific criteria regarding the relationship between the sign and the site.” *Id.* at
23 904-05.

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25 Section 602.3 clarifies that “[t]he primary business, commodity, service, industry, or other
26 activity on the premises shall mean *the use which occupies the greatest area on the premises upon*

1 which the business sign is located, or to which it is affixed.” (emphasis added). Plaintiff contends
2 that the word “use” renders this definition unconstitutionally vague for two main reasons: (1) it is
3 does not provide adequate guidance for signs which seek to advertise a specific product, (2) it is
4 unclear “[h]ow closely related [two] products need to be before the sale of the two types of
5 products is deemed a single ‘use?’” Pl. Opp’n at 11. The ordinance addresses the first concern
6 explicitly, by allowing the lesser of 25 square feet or one-third of a sign to be used for a specific
7 product.⁸ As to the second concern, plaintiff correctly points out that given the diversity of
8 products sold in San Francisco, enforcement of Section 602.3 will inevitably require some
9 context-specific determinations.

11 However, “perfect clarity and precise guidance” are not required, even of regulations
12 affecting expressive activity. *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989) The
13 definition of “primary” outlined in the ordinance provides objective criteria to cabin the discretion
14 of City officials, and is certainly no more indeterminate than the laws that passed constitutional
15 muster in *G.K. Ltd.* and *Outdoor Media Group*. See *G.K. Ltd.* 436 F.3d at 1084 (“Although the
16 design review criteria are somewhat elastic and require reasonable discretion to be exercised by
17 the permitting authority, this alone does not make the Sign Code an unconstitutional prior
18 restraint.); see also *Ward v. Rock Against Racism*, 491 U.S. at 794 (“While these standards are
19 undoubtedly flexible, and the officials implementing them will exercise considerable discretion,
20 perfect clarity and precise guidance have never been required even of regulations that restrict
21 expressive activity.”). Furthermore, the City provides a process for administrative appeal and

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⁸ “Where a number of businesses, services, industries, or other activities are conducted on
26 the premises, or a number of commodities, services, or other activities with different brand names
27 or symbols are sold on the premises, up to one-third of the area of a business sign, or 25 square
28 feet of sign area, whichever is the lesser, may be devoted to the advertising of one or more of
 those businesses, commodities, services, industries, or other activities by brand name or symbol as
 an accessory function of the business sign.” S.F. Planning Code § 602.3.

1 judicial review for reconsideration of NOVs or administrative penalties. S.F. Planning Code
2 § 610(d)(1). A hearing must be scheduled within 60 days of a request for reconsideration. *Id.* The
3 administrative law judge must issue a written decision⁹ within 30 days of the hearing, and the
4 ordinance provides a non-exhaustive list of criteria that the administrative law judge “shall”
5 consider. *Id.* The availability of prompt administrative review further cabins the discretion of City
6 officials. *See Outdoor Media Group* 506 F.3d at 905 nt.7 (“The Planning Director’s discretion was
7 further cabined by provisions explicitly permitting administrative and judicial review of his
8 decision.”).

9
10 Despite plaintiff’s reliance on *Desert Outdoor Advertising*, plaintiff cannot seriously
11 contend that Section 602.3 provides “no limits on the authority of City officials to deny a permit.”
12 *Desert Outdoor Advertising* 103 F.3d at 819 (emphasis added). To the contrary, the City’s
13 ordinance provides safeguards commensurate with those of the laws examined and upheld in *G.K.*
14 *Ltd.* and *Outdoor Media Group*. Plaintiff’s conclusory allegations of unconstitutionality do
15 nothing to refute this. Accordingly, the Court GRANTS the City’s motion to dismiss as to
16 plaintiff’s prior restraint claim.

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18 **II. Substantive Due Process**

19 Plaintiff alleges the City has violated its substantive due process rights because (1) Section
20 602.3 is “arbitrary and capricious and wholly unrelated to any legitimate governmental interest”;
21 (2) the City used “unfettered discretion” in denying plaintiff’s permit applications; and (3) the
22 City’s denial of permits “infringes on a constitutionally protected property interest.” Complaint at
23 ¶¶ 59, 61, 63.

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27 ⁹ The written decision must inform the plaintiff “of its right to seek judicial review
28 pursuant to the timelines set forth in Section 1094.6 of the California Code of Civil Procedure.”
S.F. Planning Code § 610(d)(1)(B).

1 The City highlights that plaintiff has merely rehashed the allegations supporting its other
2 constitutional claims -- under the Equal Protection Clause, First Amendment, and Fifth
3 Amendment -- to support a claim for violation of substantive due process. It argues that plaintiff's
4 "substantive due process claim alleges acts that are regulated under more specific requirements of
5 the First Amendment and the Equal Protection Clause" and should therefore be dismissed. Def.
6 Mot. at 12. Plaintiff responds by accusing the City of "[r]elying upon [an] unpublished decision
7 out of the District of Oregon" to support its position. Pl. Opp'n at 11.

8 However, in addition to the cases cited by the City, the Supreme Court has held that "if a
9 constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth
10 Amendments, the claim must be analyzed under the standard appropriate to that specific provision,
11 not under the rubric of substantive due process." *United States v. Lanier*, 520 U.S. 259, 272 n.7
12 (1997) (discussing *Graham v. Connor*, 490 U.S. 386, 394 (1989)). Plaintiff's allegations that the
13 City has used "unfettered discretion" and deprived plaintiff of "a constitutionally protected
14 property interest" clearly alleges harms under other constitutional provisions – namely the Fifth
15 Amendment,¹⁰ First Amendment, and Equal Protection Clause. Additionally, plaintiff's conclusory
16 allegation that Section 602.3 is "wholly unrelated to any legitimate governmental interest" is
17 insufficient, standing alone, to state a claim; and moreover, is belied by its allegation that the City
18 "has a substantial government interest in regulating signage, for the purpose of promoting traffic
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24 ¹⁰ "The Fifth Amendment does not invariably preempt a claim" for violation of substantive
25 due process, *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 856 (9th Cir. 2007), but
26 "[t]o the extent a property owner's complaint [constitutes a Taking] . . . the claim must be
27 analyzed under the Fifth Amendment." *Id.* at 855-56. Here, plaintiff has alleged a violation of the
28 Takings Clause. Complaint ¶ 74.

1 safety and aesthetics.” Complaint ¶ 40. Accordingly, the Court GRANTS defendant’s motion to
2 dismiss as to Contest Promotions’ substantive due process claim.
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III. Inverse Condemnation

5 Contest Promotions invokes the Fifth Amendment’s Takings Clause, which states, “nor
6 shall private property be taken for public use, without just compensation.” U.S. Const. amend. V,
7 § 4. Plaintiff alleges that the City’s refusal to re-permit its signs “depriv[es] Plaintiff of
8 substantially all of the value of its property, constituting a *de facto* taking, without payment or just
9 compensation.” Complaint ¶ 74 (emphasis in original).
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12 The Supreme Court made the Fifth Amendment’s prohibition against uncompensated
13 takings applicable to the states through the Fourteenth Amendment’s due process clause in
14 *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226 (1897). There the
15 Supreme Court held that state compensation for government takings must comport with due
16 process of law. *Id.* “The Fifth Amendment does not proscribe the taking of property; it proscribes
17 taking without just compensation.” *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of*
18 *Johnson City*, 473 U.S. 172, 194 (1985) (citing *Hodel v. Virginia Surface Mining & Reclamation*
19 *Assn., Inc.*, 452 U.S., 264, 297, n. 40 (1981)). “[J]ust compensation [need not] be paid in advance
20 of, or contemporaneously with, the taking.” *Id.* (internal quotations omitted). If the government
21 has provided an adequate process for obtaining compensation, and if resort to that process
22 “yield[s] just compensation,” then the property owner “has no claim against the Government” for
23 a taking. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018, n. 21 (1984).
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26 Therefore, in order for a takings claim to be ripe for review in a federal court, the plaintiff
27 must have (1) received a “final, definitive position regarding how [the state administrative agency]
28 will apply the regulations at issue to the particular land in question.” *Williamson County* 473 U.S.

1 at 191; and (2) “if a State provides an adequate procedure for seeking just compensation, the
2 property owner cannot claim a violation of the Just Compensation Clause until it has used the
3 procedure and been denied just compensation.” *Id.* at 195. Here, Contest Promotions has failed to
4 allege that it has availed itself of state procedures to receive just compensation; therefore, its Fifth
5 Amendment claim is unripe.
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7 Contest Promotions makes a number of arguments for why this ripeness requirement
8 should not apply. First, it argues that more recent Supreme Court case law “calls into question the
9 continued vitality of *Williamson County*.” Pl. Opp’n at 12. However, contrary to plaintiff’s
10 characterization, *Horne v. Dep’t of Agric.*, 133 S. Ct. 2053 (2013) in no way questions the vitality
11 of *Williamson County*; to the contrary, it reaffirms its central holding.¹¹ *Id.* at 2062.
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13 Next, relying on *Yee v. City of Escondido*, 503 U.S. 519 (1992), Contest Promotions
14 contends that *Williamson County* does not apply to facial challenges of constitutionality, so at a
15 minimum, a facial challenge should be allowed to proceed. In *Yee*, the Supreme Court held that
16 because the allegations supporting plaintiffs’ takings claim “[did] not depend on the extent to
17 which [they] [were] deprived of the economic use of their particular pieces of property or the
18 extent to which these particular [plaintiffs] [were] compensated” it was ripe for judicial review.
19 503 U.S. at 534. However, *Yee* only addressed the first prong of the *Williamson County* ripeness
20 test, and is therefore silent on the question of whether a facial challenge may go forward despite
21 having failed to satisfy the second prong. Moreover, unlike in *Yee*, Contest Promotions’ takings
22 claim is highly fact specific, and relates to the City’s conduct in denying its re-permitting request
23 in light of its previously held permits and the parties’ subsequent Settlement Agreement.
24 Complaint ¶ 74. Finally, unlike plaintiff’s challenges concerning its First Amendment and due
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27 ¹¹ However, plaintiff is correct that *Horne* did note that the *Williamson County* ripeness
28 requirement is prudential in nature, and “not, strictly speaking, jurisdictional.” 133 S. Ct. at 2062.

1 process causes of action, plaintiff does not plead a facial challenge to Section 602.3; and in any
2 event, in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 544 (2005), the Court made clear that the
3 Takings Clause may not be used as a springboard to launch a facial challenge of a statute for
4 failure to advance a legitimate state interest – which would presumably be the basis of any facial
5 challenge Contest Promotions might make.¹² Accordingly, the Court GRANTS the City's motion
6 to dismiss plaintiffs claim for inverse condemnation/takings, on ripeness grounds.
7

9 **IV. Equal Protection**

10 Plaintiff contends that the City's amendment of Section 602.3 violates the Equal Protection
11 Clause because it was done to specifically target plaintiff and because in denying its permit
12 applications, "the City did not treat other similar applications in this manner." Complaint ¶ 81.

13 Courts afford heightened review to cases in which a classification jeopardizes a
14 fundamental right, or where the government has categorized on the basis of an inherently suspect
15 characteristic. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Where a fundamental right is not
16 implicated, and no suspect class is identified, a government ordinance or action is reviewed under
17 the rational basis test. *Id.* An ordinance satisfies the rational basis test if it is "rationally related to
18 a legitimate state interest." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). "[S]trict
19 scrutiny under the Equal Protection Clause is inappropriate where a law regulating speech is
20 content-neutral, even where the speech at issue [is] non-commercial." *Maldonado v. Morales*, 556
21 F.3d 1037, 1048 (9th Cir. 2009). Here, both parties agree that rational basis review applies to
22 plaintiff's equal protection claim. *See Outdoor Media Group* 506 F.3d at 907 (applying rational
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27 ¹² Similarly, plaintiff argues that the ripeness requirement outlined in *Williamson County*
28 does not apply to plaintiffs seeking injunctive relief. Plaintiff cites no case for this proposition,
and the Court declines the invitation to recognize such an exception.

1 basis review to equal protection claim against an ordinance distinguishing between on-site and off-
2 site speech).

3 Contest Promotions does not appear to allege that the distinction between on-site and off-
4 site speech violates the Equal Protection Clause. Indeed, as noted above, the Supreme Court has
5 already determined that a municipality may “distinguish between the relative value of different
6 categories of commercial speech.” *Metromedia*, 453 U.S. at 514. Accordingly, “offsite
7 commercial billboards may be prohibited while onsite commercial billboards are permitted.” *Id.*
8 at 512. Furthermore, it would make little sense to hold that Section 602.3 survives the heightened
9 scrutiny of the *Central Hudson* test, *see* Section IA. *supra*, yet fails under the much more lenient
10 rational basis review. *See Outdoor Media Group* 506 F.3d at 907 (because the ordinance passed
11 the “more stringent” *Central Hudson* test, it also “satisfies the lower hurdle of rational basis
12 review.”); *Reed v. Town of Gilbert, Ariz.*, 707 F.3d 1057, 1076-77 (9th Cir. 2013), *cert. granted*,
13 134 S. Ct. 2900, 189 L. Ed. 2d 854 (2014) (“[Plaintiff’s] assertion that the Sign Code violates its
14 right to equal protection of law is basically a revision of its argument that [defendant] cannot treat
15 different types of noncommercial speech differently. Clothed in the garb of equal protection the
16 argument still is not persuasive.”); *Paramount Contractors & Developers, Inc. v. City of Los*
17 *Angeles*, 805 F. Supp. 2d 977, 1003 (C.D. Cal. 2011), *aff’d*, 516 F. App’x 614 (9th Cir. 2013)
18 (“Paramount’s equal protection claim fails for reasons similar to those that caused its *Central*
19 *Hudson* claims to fail.”); Rotunda & Nowak, 4 Treatise on Const. L. § 18.40 (“If the [Supreme]
20 Court examines the classification under the First Amendment and finds that the classification does
21 not violate any First Amendment right, the Court is unlikely to invalidate that classification under
22 equal protection principles . . . [I]t has no need to engage in independent equal protection analysis
23 . . . because it has determined that the law does not constitute the improper allocation of a
24 fundamental right.”).

1 Plaintiff instead alleges that it has been singled out by the City for disfavored treatment
2 relative to other similarly situated signage permit-applicants – otherwise known as a “class of one”
3 claim. Complaint ¶¶ 81-82. “The Supreme Court has recognized that ‘an equal protection claim
4 can in some circumstances be sustained even if the plaintiff has not alleged class-based
5 discrimination, but instead claims that she has been irrationally singled out as a so-called ‘class of
6 one.’” *Gerhart v. Lake Cnty., Mont.*, 637 F.3d 1013, 1021 (9th Cir. 2011) (quoting *Engquist v.*
7 *Or. Dep’t of Agric.*, 553 U.S. 591, 601 (2008)). The Equal Protection clause protects individuals
8 constituting a class of one if the plaintiff demonstrates that there has been irrational and intentional
9 differential treatment. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). “A ‘class of
10 one’ claim requires a showing that the government ‘(1) intentionally (2) treated [plaintiffs]
11 differently than other similarly situated [businesses], (3) without a rational basis.’” *Net Connection*
12 *LLC v. Cnty. of Alameda*, No. C 13-1467 SI, 2013 WL 3200640, at *4 (N.D. Cal. June 24, 2013)
13 (quoting *Gerhart* 637 F.3d at 1022). “We have recognized that the rational basis prong of a ‘class
14 of one’ claim turns on whether there is a rational basis for the *distinction*, rather than the
15 underlying government *actionGerhart* 637 F.3d at 1023 (citing *SeaRiver Maritime Financial*
16 *Holdings, Inc. v. Mineta*, 309 F.3d 662 (9th Cir.2002)) (emphasis in original).
17

18 In *Gerhart*, the plaintiff was required to apply for a permit, and was ultimately denied a
19 permit to build an approach to a county road; meanwhile, ten other landowners on his block were
20 allowed to build approaches to the same road without the county even requiring a permit. Here,
21 by contrast, Contest Promotions has failed to make any non-conclusory allegations tending to
22 show that the City treated it differently than other applicants applying for signage permits. Contest
23 Promotions does not allege that other businesses have received permits to display similar signs;
24 nor does it even allege that its signs are entitled to be permitted as on-site signage as defined by
25 Section 602.3. For this reason, its equal protection claim must fail. *See Summit Media LLC v. City*
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1 *of Los Angeles, CA*, 530 F. Supp. 2d 1084, 1091 (C.D. Cal. 2008) (“[U]nless Plaintiff can plead
2 facts sufficient to show that City actually [acted] with the intent of discriminating against Plaintiff,
3 an amended complaint will not survive the pleading stage.”). Accordingly, the Court GRANTS
4 defendant’s motion to dismiss Contest Promotions’ claim for violation of equal protection.¹³
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7 V. State Law Causes of Action

8 Contest Promotions has filed its suit in a federal forum pursuant to 28 U.S.C. §1331, which
9 provides for federal question jurisdiction. As the litigants to this action are non-diverse, this is the
10 only plausible basis for federal jurisdiction. In addition to the federal law causes of action
11 discussed above, Contest Promotions has also alleged a number of causes of action based in state
12 law, including (1) breach of contract, (2) breach of implied covenant of good faith and fair
13 dealing, (3) fraud in the inducement, and (4) promissory estoppel. Federal courts may take
14 supplemental jurisdiction over such state law claims when they “are so related to claims in the
15 action within such original jurisdiction that they form part of the same case or controversy under
16 Article III.” 28 U.S.C. § 1337(a). However, a district court may decline to exercise supplemental
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20 ¹³ To the extent plaintiff’s equal protection claim is premised on the notion that the City
21 amended Section 602.3 to specifically target its business, it must also fail. First, Section 602.3 is a
22 law of general applicability, and as Contest argues, the amendment of the ordinance, if anything,
23 “broaden[ed] . . . the City’s restriction on commercial speech.” Pl. Opp’n at 8. Second, under
24 rational basis review, “it is entirely irrelevant for constitutional purposes whether the conceived
25 reason for the challenged distinction actually motivated the legislature.” *F.C.C. v. Beach
26 Commc’ns, Inc.*, 508 U.S. 307, 315 (1993). Therefore the court “attach[es] no legal significance to
27 the timing’ of legislative or municipal action.” *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137,
1156 (9th Cir. 2004) (quoting *Bannum, Inc. v. City of Fort Lauderdale*, 157 F.3d 819, 822 n. 3
(11th Cir.1998)). “[T]hose attacking the rationality of the legislative classification have the burden
‘to negative every conceivable basis which might support it.’” *Beach Commc’ns* 508 U.S. at 315
(quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). The Court
expresses no view on whether such a targeting claim might provide more traction with respect to
plaintiff’s potential state-law and tort claims.

1 jurisdiction when “the district court has dismissed all claims over which it has original
2 jurisdiction.” 28 U.S.C. § 1337(c)(3). The Supreme Court has cautioned that “when the federal-
3 law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the
4 federal court should decline the exercise of jurisdiction by dismissing the case without prejudice.”
5 *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350, 108 S. Ct. 614, 619, 98 L. Ed. 2d 720 (1988).
6

7 If all of Contest Promotions’ federal claims are dismissed from this action, the Court the
8 Court intends to dismiss the action without prejudice so that a state court may decide the state
9 claims in the first instance. Accordingly, the Court DEFERS ruling on the City’s motion to
10 dismiss as to all of Contest Promotions’ state law claims.

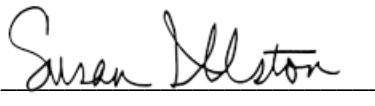
11 At the case management conference, scheduled for April 24, 2015, the Court intends to
12 discuss with the parties the question of whether leave to amend any of plaintiff’s federal claims
13 should or must be granted.

16 CONCLUSION

17 For the foregoing reasons, the Court GRANTS in part the City’s motion to dismiss. At the
18 case management conference on April 24, 2015, the Court will discuss with the parties whether
19 dismissal of Contest Promotions’ federal law claims should be with or without prejudice. This
20 order resolves Docket No. 15.

23 IT IS SO ORDERED.

24 Dated: April 22, 2015

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26 
27 SUSAN ILLSTON
28 United States District Judge